APPENDIX.

OPINION OF THE CIRCUIT COURT OF APPEALS.

Nos. 7875, 7876, 7877.
October Term, 1942, January Session, 1943.

March 17, 1943.

Before EVANS, SPARKS, and MAJOR, *Circuit Judges.*

EVANS, *Circuit Judge.* These four appeals were consolidated for presentation. They raise somewhat similar questions. Three, Nos. 7875-7, may be disposed of in one opinion. The appeal in No. 7878 must be separately considered and will be treated in a separate opinion.

Generally speaking, all the appeals involve the distribution of the obligations and the maintenance and operating expenses of the Chicago and Western Indiana Railroad Company, herein called the Western Indiana, which was organized in 1879, to provide terminal facilities for use by such railroads as might become its lessees. Western Indiana holds the legal title to what is known as the old part of the Dearborn Street passenger station, and general facilities, with the land, and approximately 25 miles of first or main-line railroad tracks and other tracks called second, as well as other property.

It entered into 999 years leases with five lessees: (1) Chicago and Erie Railroad Company, here called the Erie, appellant in No. 7878; (2) The Grand Trunk Western Railroad Company, here called the Grand Trunk, appellant in No. 7875; (3) The Chicago, Indianapolis and Louisville Railway Company, here called the Monon, appellant in No. 7876; (4) The Chicago and Eastern Illinois Railroad, herein called the Eastern Illinois, and (5) The Wabash Railway Company, hereinafter called the Wabash. The two last-named lessees are the real adversary parties to appel-

lants in Nos. 7875 and 7876. The other lessees oppose Erie in its contentions in No. 7878.

Western Indiana is appellant in appeal No. 7877. It seeks instruction and guidance in making its future rental charges.

The litigation started as a so-called friendly suit, brought by Western Indiana, against Erie, to recover what Western Indiana alleges, and Erie denies, is rental due as Erie's unpaid, proportionate share of certain costs and expenses incurred by Western Indiana during the period, April 1, 1933, to December 31, 1938.

Allegedly due on this amount was $114,071.14. Erie denied all liability and filed a counterclaim, alleging that it had overpaid its share of the rentals and sought judgment for the amount of said overpayment, amounting to $126,-852.72 on the so-called management issue and for $121,-804.97 on the disputed rental issue.

Erie also is a stockholder of plaintiff. It assails Western Indiana's action in refusing to curtail certain suburban services which it is operating at a loss of $100,000 a year, after five of the six directors of plaintiff's board voted in favor of curtailment.

Erie's counterclaim against Western Indiana caused the latter to bring in the Grand Trunk, the Monon, the Eastern Illinois, and the Wabash, and ask the court to adjudge and declare the rights and liabilities of all such parties with respect to Western Indiana's operating and working expenses under the various leases to these parties. It also sought a declaratory judgment which would be its guide for distribution of its future rental charges. The new parties defendant deny liability. Grand Trunk and Monon each filed cross claims and counterclaims and asked for an accounting. All the bars were now down. The litigation provided a field day for all parties who entered their favorites,—dark horse grievances.

A further statement of the issues can best be understood if a short resumé of the Western Indiana's history and activities is given. Organized in 1879, for the purpose of constructing a line of railway from Indiana State Line and also from Dolton, Illinois, into the City of Chicago, and there providing terminal facilities for use in common by Eastern Illinois and such other railroads as might become its lessees, the first stage of its construction was completed

in 1880, since which time it had been the owner of a terminal in Chicago and two main lines of tracks between this terminal and the State Line near Hammond, Indiana, and the other at Dolton, Illinois. In addition to these two short main lines, Western Indiana owns "tracks, switches, turnouts, side tracks, yards, stations, appendages, and terminal facilities" comprising what is known as its "common property."

Since 1880, additions and betterments to the common property in the way of improvements have been made. It has raised its tracks; it has also acquired what is known as the Belt Division and also various tracks, yards, and facilities not included in the "common property."

Between October, 1879 and December, 1881, Western Indiana granted five, generally similar, leases, each for 999 years to the five above-named lessees, or their predecessors. The first lease was to Eastern Illinois. Each lease granted exclusive right to use certain described portions of the terminal property and also the right to use, in common with Western Indiana and such other company or companies as might obtain from Western Indiana the grant of similar rights, all the specified portions of the main tracks, passenger depot, and appurtenances.

The lease to Eastern Illinois gave it the exclusive right to conduct the entire local business between Chicago and Dolton. The lease to Erie gave Erie a similar right to the local business between Calumet River and Hammond, Indiana.

Each lease provided that each lessee should pay $5 per year, and such sum as would pay the interest upon the Western Indiana's mortgage and provide sinking funds for the payment of the principal in 35 years from January 1, 1885. Said lease also provided for the lessee's paying taxes and assessments, as well as all expenses of maintenance, management, and operation.

The different bases of rent payment are what has led to conflicts, disputes, and to litigation. Four times these disputes have reached this court. (131 F. 2d 215; 94 F. 2d 296; 86 F. 2d 441; 141 F. 785.)

Each time a different phase of the ever-hot and burning controversy was involved.

Rental payments were determined in one of two ways: either on the basis of use which was measured by the ratio

of engine and car use of the property by one lessee to the total engine and car use of all five lessees. This was called the wheelage basis. The other rental called for payment by each lessee equally.

While the Western Indiana was originated as an independent venture, the stock of the company was soon acquired by the five lessee railways, each of which owned 20%. Such ownership has continued in the same ratio since 1882. About that same date an agreement was made, known as the 1882 Inter-Tenant Agreement, which provided that Western Indiana should exclusively manage and control all the property used by Western Indiana and its five lessees; should furnish at cost all facilities and perform all services required by it and as defined in the Inter-Tenant Agreement. Some expenses were to be distributed on the wheelage basis. Other expenses were to be borne equally by the owner-tenants. For exact coverage, read the provisions hereafter quoted.

The original bond issue was supplemented by a new bond issue when a new passenger station and additional track were constructed and numerous betterments were made which resulted in a new agreement executed in 1902, the terms of which and their effect on the 1882 Inter-Tenant Agreement are of large, if not determinative, importance in the disposition of these appeals. A new consolidated mortgage for $50,000,000 was negotiated. The five lessees executed an agreement which provided for the issuance of the mortgage and bond issue and "for the execution of new contracts of leasing," all to be embodied in one document. The joint supplemental lease bore date, July 1, 1902, and carried into effect this preliminary agreement of the tenants. It provided for the refunding of the bond issue, the payment of rentals, and other matters of no particular importance in this case.

One paragraph of large importance is No. 33. It is set forth in the margin.* Beneath it is paragraph 6 of the

* "33. Operating Expenses Divided on Wheelage] Eleventh. That after the date hereof the lessor shall exclusively manage, operate and maintain every portion of the common property; and the entire cost of the management, operation, maintenance, repair and renewal of, and of all taxes, liens, water rents and assessments on, said railroad, buildings and facilities, the common use of which is reserved to the parties hereto, and the entire cost of the management, operation, maintenance, repair and renewal of, and all taxes, liens, water rents and assessments on, all enlargements and improvements thereof and additions thereto and on and to any other railroad hereafter acquired by the lessor for the common use of

Inter-tenant Agreement of 1882.** These two afford the *pièce de résistance* of this suit.

Since 1902, additional bonds have been issued and the lessees have, through additional leases, obligated themselves to pay additional rental, that interest and principal on the bonds may be always paid.

The property of Western Indiana is used in part by other railroads. At the present time they are three in number,—the Belt Railroad, the Atchison, Topeka and Santa Fe Railway Co., and the Elgin, Joliet and Eastern Railway Company. It has also rented properties, nine parcels, paying therefor, $90,084.25 per year.

The business of the five-owner-lessees developed somewhat differently, and the rental payments on the wheelage basis began to vary. As a result, it became a matter of

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the parties hereto, shall be borne by said lessees in the proportion of their several wheelage uses of the various portions of said railroad to the total wheelage use thereof; and for the purpose of distributing such cost, the lessor shall divide by lines across and at right angles with its right of way, its said railroad and property, including all appurtenances, into such sections as may be necessary in order to equitably distribute such cost of the management, operation, maintenance, repair and renewal of, and all taxes, liens, water rents and assessments on, said several sections among the parties of the second part in proportion to their respective wheelage uses of such sections; and it may, from time to time, change such sectional divisions the better to subserve the purpose and intent aforesaid."

** "6th. The term, 'working expenses,' as used in this agreement, shall include all taxes and assessments, ordinary and extraordinary, against the property of the Western Indiana Company, except that leased as aforesaid to the said Belt Railway Company, and property leased, or that may be leased, exclusively to one of the parties of the second part, or some other company or person; the cost of maintaining, repairing and renewing its railroad, tracks, buildings and other property, in the common use of the parties of the second part; the expense of providing and maintaining gates, signals, semaphores and lights, and of complying with any and all requirements that may be imposed by national, state or municipal authority; the expense of all service which the Western Indiana Company may have to employ; the cost of maintaining its corporate organization, and of protecting and defending its property, including suitable insurance thereof; all judgments against the Western Indiana Company and the expense of litigation, and *all other claims and demands of every name, nature and description*, for which the Western Indiana Company may be legally liable, excepting its mortgage debt and the interest thereon, and excepting therefrom, and from all the provisions of this paragraph, such claims and demands as, under this agreement, or the leases and supplemental leases between the Western Indiana Company and the several parties of the second part, should be paid exclusively by one of the parties of the second part. The cost of permanent improvements and of additions to the Western Indiana Company property shall not be deemed to be included in the term 'working expenses' as used in this paragraph." (Italics ours.)

advantage to one tenant to pay its rental on the wheelage basis, while to another, an advantage lay in payment on an equal basis.

A by-law of Western Indiana provided:

"A. In the management and control of the railroad and property of the Company which is used in common by the present five railway company lessees thereof, * * * and in the establishment and enforcement of rules and regulations for the use of said railroad property, it shall be necessary to secure the *unanimous* approval of said railway company lessees."

Various efforts to effect a compromise were defeated by the spokesmen of one or more tenants. Auditors and Committees of Advisors made reports as to the correct method of determining whether an item fell within the wheelage proviso, but all reports came to naught for want of unanimous approval. The lessee or lessees who were benefited by the prevailing method of distributing expenses blocked all possible proposed settlements and attempted clarifications. The lessor was not consistent or uniform in its rulings. In one instance a substantial item was allocated first on a wheelage basis, then on an equal basis, then back to the wheelage basis.

The items which are involved in the appeal of Grand Trunk and Monon, are four in number: (1) disputed rentals; (2) the Grand Trunk payment; (3) Western Indiana's separate railroad operations; (4) miscellaneous charges and expenses.

(1) The Western Indiana leased nine pieces of property and paid rental therefor. The largest rental item was $48,718.72, paid annually to Santa Fe. For the remaining eight parcels, a rental of $41,365.72 was paid to the five shareholder-lessees in different amounts.

(2) An annual payment of $20,665.35 by Western Indiana has been made to Grand Trunk since July 1, 1902, and was to continue until "Grand Trunk shall use lessor's road south of 49th Street." (Such use by Grand Trunk has not occurred.) This agreement and payment were the result of certain cancelled provisions in the 1891 lease to Grand Trunk.

(3) Lessor incurred expenses for two services—suburban passenger train service and freight switching. Both

are conducted on the common property. The expenses have been heretofore paid out of lessor's income. In other words, they have not been billed separately to and paid by the lessees.

(4) Charges and expenses for "Foreign Freight Cars —Per Diems, Reclaims, and Repairs; Illinois Franchise Tax; Federal Income Tax; Miscellaneous Taxes; Work Equipment — Insurance, Depreciation and Repairs; Expenses on Funded Debt; and Taxes on Surplus Property."

The contested question in each case turns on the query,— How should these expenses be distributed, on a wheelage basis, or equally?

Preliminary questions which are advanced by opposing counsel must first be met.

Much weight is given by Grand Trunk and Monon to the decision of this court in a case (94 F. 2d 296) brought to determine whether certain capital stock taxes should be distributed upon the wheelage basis. Without discussion, we accept, not because of any doctrine of *stare decisis*, but rather because of the strength and merit back of the reasons and conclusions, that part of the opinion which holds that the lessees are not bound or estopped by their payments to the lessor nor is the lessor bound by its construction of the contract and method of distribution of expenses.

The venture of the lessor and lessees was quite similar to, if indeed it was not, a joint venture. The many items of expenses of the lessor necessitated prompt payments by the lessees. Adjustments could be, and were, made by both sides. None of the parties ever made their payments as a settlement of a stated account. In fact, the lessor occupied somewhat the position of a trustee. (*Grand Trunk Ry. Co.* v. *Chicago & W. Ind.*, 131 F. 2d 215.)

We are also convinced that if the Inter-Tenant Agreement of 1882 governs, the items here in dispute are chargeable to tenants on the usage or wheelage basis.

Supplementing the reasons given by the court in the capital stock tax case, we find much justice and persuasive reason back of such an allocation. When the five roads, which were to use these terminal facilities of Western Indiana concluded to embark on this enterprise and to purchase the property, each contributed the same sum and each took 20% of its stock and each acquired a lease

with the right to use the common property for a period of 999 years. Each was to pay a rental to cover the charges.

The difficult task of distributing the expenses and charges arose. It was to be done as rentals. Being equal owners, the parties might have provided for carrying the burden of all expenses, equally. Likewise, the burden could have been distributed among the owner-tenants on the basis of their use of the property. The parties adopted neither in whole and both in part. This not only would appear to be the fair way, but the parties so believed and settled the matter by their written agreement. This was in 1882.

As the five roads' businesses increased and the Chicago terminal became more important and valuable, costly improvements and betterments were required. In twenty years this led to the flotation of a $50,000,000 mortgage and the execution of an agreement to give assurance of interest and refunding payments and to make the bonds sufficiently attractive to insure a low rate of interest.

The fundamental basis for distribution of Western Indiana's costs, however, remained the same. The tenant was to pay in accordance with the extent of his use, save where the investment improvement and some similar items justly required the owners to pay according to their holdings in the company's equity.

Concluding as we do that all four items, rental, Grand Trunk payments, Western Indiana's separate railroad operation, and each miscellaneous charge and expense, would, under the agreement of 1882, be items for which the lessees should pay on a user or wheelage basis,* we come to the seriously argued question in the case. It is the ground upon which appellees must rely in order to prevail, *i. e.*, the cancellation (or abrogation) of the 1882 agreement by the 1902 agreement.

Appreciating the importance of this fact, the District Court met the question squarely and, by its 3rd conclusion of law, declared provision of paragraph 9 of the Preliminary Proprietary Agreement and paragraph 33 of the Joint Supplemental Lease of July 1, 1902, "superseded and abrogated paragraphs 5 and 6 of the Inter-Tenant Agreement of November 1, 1882," and the various provi-

* For a telling statement of the reasons why we so conclude, see Judge Lindley's opinion in 94 F. 2d 296.

sions in prior leases, etc. The District Court concluded that the Inter-Tenant Agreement of 1882 and the 999 year leases, so far as they provided for rental on a wheelage basis, were cancelled and the new agreement narrowed in scope the services for which rental on a use or wheelage basis was payable.

Grand Trunk and Monon contend that this is at variance with the decision of this court in the capital stock tax case. They also argue that this conclusion is in direct contradiction to the provision of paragraph 37 of the 1902 agreement, which reads:

"That nothing herein contained shall in any way alter, impair, or affect said existing leases, or any or either of them, or any matter or thing therein, except as herein otherwise specifically provided."

It would have been easy for the parties to have expressly cancelled the rent provisions of the leases and particularly paragraphs five and six of the Inter-Tenant Agreement of 1882, if such were the agreement of the parties. Instead, however, the 1902 agreement, which appellees rely on as a cancellation of the 1882 agreement, expressly provides that the existing leases were in no way *altered, impaired or affected,* "except as herein otherwise specifically provided."

An agreement referred to by counsel and by the District Court, which preceded the execution of this 1902 agreement, was called the "Preliminary Proprietary Agreement." It was executed, January 16, 1902, and obtained its name, Preliminary, because it was the forerunner,—the basis—of the ultimate agreement into which it merged when the 1902 agreement was executed, July 1, 1902. It added nothing to the terms or the effect of said July 1, 1902 agreement. Consequently there is presented only the effect of the 1902 agreement on existing leases. The same question was before us in the capital stock tax case.

In view of the express provision above quoted, to the effect that no impairment, no alteration, and no effect of existing leases occurred by virtue of this, the 1902 agreement, "except as herein otherwise specifically provided," we must reject the contention that there was "a cancellation" or "an abrogation" of paragraphs 5 and 6 of the 1882 agreement by the July 1st, 1902 agreement.

This conclusion being inescapable, we must read and

give effect to paragraph 33 to ascertain the extent that the existing leases were by it otherwise specifically superseded.

In describing the working expenses for which the parties were liable on a wheelage basis, paragraph 6 of the 1882 agreement provides:

"The term, 'working expenses,' as used in this agreement, shall include * * * all judgments against the Western Indiana Company and the expense of litigation, *and all other claims and demands of every name, nature and description,* for which the Western Indiana Company may be legally liable, excepting its mortgage debt and the interest thereon, and excepting therefrom, and from all the provisions of this paragraph, such claims and demands as, under this agreement, or the leases and supplemental leases between the Western Indiana Company and the several parties of the second part, should be paid exclusively by one of the parties of the second part. * * *" (Italics ours.)

This italicised provision does not appear in paragraph 33 of the 1902 agreement. Specifically, the question is,—Should we, in view of paragraph 37 (1902 agreement) heretofore quoted, which retained in full force and effect every provision of the existing leases ("or matter or thing therein") not "herein otherwise specifically provided," hold that this provision of paragraph 6 was cancelled? We had occasion to discuss the same subject in the capital stock tax case and concluded that this agreement, appearing in paragraph 6, remained intact after the 1902 agreement. We can not see how any different conclusion could have been reached. Paragraph 37 of the 1902 agreement expressly covers the situation. The quoted agreement appearing in paragraph 6 does not come within the exception of paragraph 37. It therefore clearly follows that the lessees are all bound by the above-quoted provision of section six and must pay the expenses, such as rent and other items which are the subject of this litigation, on a wheelage basis.

In disposing of this case we have given scant attention to the application of the doctrine of *stare decisis.* We have expressed our views on the effect to be given to the rules of *stare decisis,* "law of the case," and *res adjudicata,* in *Luminous Co.* v. *Freeman Co.,* 3 F. 2d 577. Counsel for appellants in Nos. 7875-6 have insisted that this

case is governed by the decision of this court in *In re Chicago & E. I. Ry. Co.*, 94 F. 2d 296.

It is not to be understood that we are indifferent to the rule of *stare decisis*. In view of the earnest contention of the parties, their relations to each other, the evident desire of Western Indiana and at least some of the other lessees, to keep this large and important venture operating justly and fairly, we have felt it wise to reconsider the questions and, irrespective of the capital stock tax decision, reach an independent conclusion.

Our conclusion is that paragraph 37 of the 1902 agreement is express and explicit in its terms. That paragraph makes it impossible for us to conclude that the agreement of 1902 abrogated the previous existing agreements or rights of the lessees. On the other hand, that paragraph expressly sustained all existing contract rights not specifically changed. Among such rights was the lessees' right to have certain expenses paid on the wheelage basis. Included within the terms of the provision which called for payment on wheelage basis was "any and *all other claims and demands of every name*, nature and description for which the Western Indiana Company may be legally liable."

The decree of the District Court is reversed with directions to enter one in accordance with the conclusions expressed in this opinion. The Western Indiana should be granted a decree instructing it to allocate expenses in so far as the items here involved are concerned, among the lessees on a wheelage basis. The decree to be entered should provide that Western Indiana should restate its account charging some of the lessees with the difference between what they have paid and what they should pay on a wheelage basis, and crediting others with the difference between what they have paid on an equal basis, and what they should have paid on a wheelage basis. The decree will be subject to a further modification if there be any alteration or change in the method of apportioning expenses to be distributed on a wheelage basis if the appeal in No. 7878, *Erie Railroad* v. *Western Indiana*, necessitates or directs a modification of existing methods.

OPINION OF THE CIRCUIT COURT OF APPEALS.

No. 7878. October Term, 1942, January Session, 1943.

March 19, 1943.

Before EVANS, SPARKS, and MAJOR, *Circuit Judges.*

EVANS, *Circuit Judge.* This is a companion appeal to Nos. 7875-7, disposed of March 17, 1943. The facts set forth in that opinion and the statement of this court in its opinion in In re C. & E. I. Ry. Co., 94 F. 2d. 296, furnish additional background for the issues here presented. The parties will be named as in the companion cases.

Here, as there, the controversy arises out of agreements made by the Western Indiana and its five co-owner lessees and deals with so-called management costs and working expenses of this terminal railroad.

Western Indiana brought suit against Erie to recover what it asserted was an unpaid portion of Erie's share of management costs. Erie answered and counterclaimed, setting forth that it had paid more than it should have paid, and demanded judgment for the overpayments. It also asked that it be not required to participate in the operation of the suburban service of Western Indiana, which has been and is conducted at a loss. Judgment was rendered against Erie in favor of Western Indiana for the sum of $114,071.13 on the management, and for $42,467.87 on the disputed rental, issues.

Erie seeks to reverse this judgment and to recover $125,229.67 for overpayment of management or general overhead cost. While some of the questions determined in appeals Nos. 7875, 6, 7 are considered by counsel in their briefs on this appeal, we will refrain from considering or again stating the facts which furnished the background for the disposition of those appeals.

Two separate and distinct questions are presented by

Erie. One involves the relief by it sought in respect to the operation of the losing suburban business by Western Indiana. The other question is the method of distributing the entire cost of "management operation, maintenance, repair, and renewal of, and taxes, liens, water rents, and assessments on Western Indiana Railroad buildings and facilities." The second question covers not only the money judgment entered in favor of Western Indiana against Erie, but the sum demanded by Erie on its counterclaim.

Erie contends that rentals based on a user basis can not be determined by the wheelage basis alone. The user basis, supplemented by the division of the railroad property into sections, requires not only the determination of the amount of use as measured by cars and engines, but calls for consideration of the character of the use by sections. In other words, Erie asserts that these sharp variations in costs and proportions of user services in the different sections, necessitate attention to sections as such.

The cost of operation varies when measured by engine or car miles, due principally: (a) to services for passenger station and coach switching exclusively for passenger traffic; (b) to other special services for both passenger and freight traffic at the north end of the common property; (c) to a smaller volume of traffic on some portions than on others.

Erie illustrates the unjust distributions of a uniform rate, a rate which ignores section lines, by taking a single mile in one section and comparing it with a mile operated in another section. It asserts that Western Indiana charged at a rate of $1.63 a mile for miles run in Dearborn station "A" while the cost of materials and labor amount to $1.90, whereas the material and labor cost was less than 3¢, south of 55th Street.

More specifically it may be said that Erie predicates its argument on the July 1st, 1902 agreement, which is one agreement where the 1882 inter-tenant agreement is specifically changed.

Paragraph 33 specifically provides (contrary to the 1882 agreement) for the creation of sections as units of use by different railroads. The particular clause here involved reads as follows:

"* * and the entire cost of the management, * * * shall be borne by said lessees in the proportion of their

several wheelage uses of the various portions of said railroad to the total wheelage use thereof;
"and for the purpose of distributing such cost, the lessor shall divide by lines across and at right angles with its right of way, its said railroad and property, including all appurtenances, into such sections as may be necessary in order *to equitably distribute such cost of management*, operation, maintenance, repair and renewal of, and all taxes, liens, water rents and assessments on, said several sections among the parties of the second part in proportion to their respective wheelage uses of such sections;
"And it may, from time to time, change such sectional divisions the better to subserve the purpose and intent aforesaid." (Italics ours.)

A chart showing how plaintiff's property is divided into sections is a part of the record. It is not denied (as Erie contends) that certain sections do not require the same amount of management expense as other sections. It is not questioned, but that the heavy management expense is either at Dearborn Station "A" or Dearborn Station "B." One section includes Dearborn Station "A" and the railroad tracks for about half a mile south of it. The railroad tracks require but a small part of the cost for the station services as a whole. The charges for such cost of material and labor for this station are placed against the users and based on the number of engines and cars leaving the station. The user's apportionment of its general overhead costs is based on the total engine and car miles run on the common property. Approximately 99% of such miles were outside of the station section and consisted chiefly of miles run of freight traffic, which did not use the passenger station or call for the extra services incident to passenger business. It cites a single month where the actual cost charged was computed and found to be $172 for management, whereas the expense (labor and material) was a hundred times that amount. It could hardly be otherwise.

But the vital question is,—did the parties by their agreement provide for a division on a section basis, so as to adjust—in part at least—what is apparently an injustice (due to changes in amount and character of business done by the lessees) if user's service is determined by wheelage on all the common property? If the parties have not so agreed, the courts can give the aggrieved lessees no

redress. On the other hand, if the agreement permits of more equitable adjustment of this item among lessees, based on section consideration, we are not inclined to give much heed to action forced on Western Indiana by one tenant who is relying on an unfortunate by-law which requires unanimous vote to make a change in the agreement.

Basically the question is whether Western Indiana, in apportioning management costs on a user basis, has made, and is making, a proper apportionment of such costs, in view of the contracts which govern the subject.

Erie asserts that plaintiff does not make any charge against the units of service for managing its production, nor does it require its users to pay a share of the general overhead cost of service based on management work done in producing it. It apportions such cost at a uniform rate per mile of movement of engines and cars by its lessees for all of the common property, and for that purpose it keeps an account of engine and car miles run by its lessees on the common property. All items of cost other than such as are assigned to some one section and property taxes, are designated as "management" cost and charged to the users of the common property in the proportions which their engine and car miles bear to the total engine and car miles. The freight traffic, for which practically no special services are furnished, is charged the same rate per mile as the passenger traffic which receives terminal station and other special services. In other words, the charge is that in apportioning the general overhead cost the sections are disregarded and serve no purpose and the variation in cost from section to section is not considered.

Without elaborating the details showing the injustices that follow the practice of ignoring the sections and the character of the service rendered therein, it is, we think, sufficient for our conclusion to determine the purpose of the provision in the agreement which specifically dealt with *sections, as such*, and construe and apply such above-quoted provision.

We fail to understand why this agreement, which changed the existing agreement, was inserted, unless the parties contemplated, and intended, adjustment of management expense on the basis of kind of use which took place in the different sections. The difference between that section which contained the depot and the sections which marked the boundaries of a part of the freight yard, is so obvious

that it is hardly conceivable that the lessees should ever have agreed to a division of said cost on any basis which did not take into consideration the kind of service demanded and rendered, as well as the extent of such use. For the kind of use determined the kind of service Western Indiana rendered, and it in turn measured the cost of such service.

The agreement expressly provided that it was *"for the purpose of distributing such costs"* of management operation, maintenance, etc., that the "lessor shall divide its railroad property *into sections*" by lines which ran across and at right angles with its right of way. Moreover, it expressly provided that Western Indiana might "from time to time, change such sectional divisions *to better subserve the purpose and intent aforesaid.*"

Clearly, this intention was *to more equitably distribute the management costs.*

If all lessees made like use of the common property, there would be no basis for complaint. But where variances existed in lessees' passenger and freight business, the adopted method could not be equitable and just.

In view of the results, we can see no reason for sustaining a practice which wholly ignored the agreement which provided for a division of the common property into sections. We can see no reason for dividing the property into sections, save as a practical matter, the kinds of services varied, the costs thereof varied, and the parties wanted to apportion the costs as fairly as possible, and the sectional basis promoted equitable distribution of costs.

The only reason that seemingly is advanced in opposition to Erie's contention is that the practice has been long continued. This objection, we rejected in the capital stock tax case. In other words, recovery was not barred by voluntary payment in such a case. In the companion cases we reached the same conclusion. We reaffirm it here.

It follows that apportionment of management costs as now and heretofore made, can not be sustained.

The money judgment against the Erie, in favor of Western Indiana, must be, and is, reversed. However, it does not follow that judgment should be directed in favor of Erie for the amount it claims to have overpaid, towit, $125,229.67. Inasmuch as the District Court decided it was not entitled to recover at all, the court did not pass

upon the items which make up this amount. Likewise, there may be issues not presented to us, such as estoppel, laches, or the statute of limitations, which have not been passed on by the District Court, and which may have a bearing on the right of Erie, or the amount which Erie may recover for overpayment of management or general overhead costs.

Respecting Erie's right to be relieved from the expense of the unprofitable operation of Western Indiana suburban business, we are not satisfied from the record before us as to the origin of this service. We do not know whether it was rendered as a part of the Western Indiana's duty as a common carrier or whether it was ordered either by the Illinois Commerce Commission or the Interstate Commerce Commission. Moreover, it may be that the service can not be discontinued, without consent or approval of one of these bodies. On the showing before us, we are not prepared to grant the relief sought. Its denial will be without prejudice.

The judgment of the District Court is reversed, and the cause is remanded with instructions to dismiss the action of Western Indiana against Erie and to take such further evidence as may be necessary to determine whether the Erie shall recover on its counterclaim, and, if anything, the amount thereof.

OPINION OF THE CIRCUIT COURT OF APPEALS.

Nos. 7875, 7876, 7877, 7878.
October Term, 1943, January Session, 1944.

January 21, 1944.

Before EVANS, SPARKS, and MAJOR, *Circuit Judges.*

EVANS, *Circuit Judge.* The Chicago & Eastern Illinois Railroad Company and the receivers of the Wabash Railway Company have filed a petition for rehearing, and later asked leave to adduce additional evidence, either before this Court or the District Court, to support their construction of the leases and contracts which are the subject of this litigation. Also, there is before us, a motion of the Chicago and Erie Railroad Company to set aside and vacate the order entered by this court, September 27, 1943, recalling the mandate, and a motion that the mandate stand as originally issued, in No. 7878.

This mandate was recalled on the theory that if the so-called newly-discovered evidence should affect the outcome of the appeals in Nos. 7875-7877, there might be a different conclusion than that reached in the opinion which was heretofore filed by us in No. 7878, and which was not attacked by petition for rehearing. A mandate in No. 7878 had been duly issued, but was recalled when the application for leave to present newly-discovered evidence was filed.

To support their application for leave to present newly-discovered evidence, petitioners assert that in the trial of this case they stipulated as to important facts, all parties being on a friendly basis and all seeking to avoid unnecessary expense and delay. However, petitioners assert that, through no want of diligence, they failed to discover certain enlightening contemporaneous stenographic records of meetings and other documents which led up to the 1902 written agreement, which evidence clarifies the intention of the parties. They assert such evidence would affect the conclusion which we reached as to the proper construction

of the agreements which determine the various issues presented by this litigation. They ask that opportunity be given to them to present this evidence either to this court or to the District Court.

In opposition to this application, two of the lessees challenge both the admissibility and the persuasiveness of this evidence. Also challenged is the procedural right of applicants to present, at this late date, any motion for modification of the decree, or for a new trial because of the discovery of new evidence. These objectors contend that under the Rules of Civil Procedure, newly-discovered evidence may be presented only up to the "expiration of the time for appeal," (Rule 59), and they also charge that the procedure for filing of a bill of review on the basis of newly-discovered evidence no longer obtains. The argument is advanced that since the time under Rule 59 expired in September, 1941 —when the time for appeal would have expired—the petitioners were without right, and this court without jurisdiction, to permit the introduction of this newly-discovered evidence, either in the District Court or in this court.

We reject this contention and hold that where an appeal is taken, Rule 59 does not bar the party from making application to the Circuit Court of Appeals for leave to present newly-discovered evidence.

The particular language of the rule which limits the moving party to the date of the expiration of the time for appeal, is significant. It is the time within which an appeal may be taken which marks the limitation for presentation of newly-discovered evidence to the District Court. If an appeal is taken, it transfers to the appellate court the disposition of the application. *Hazeltine Corp.* v. *Wildermuth*, 35 F. 2d. 733; *Boro Hall Corporation* **v.** *Gen. Motors Corp.*, 130 F. 2d. 196; *Rome Grader & M. Corp.* v. *Adams Mfg. Co.*, 135 F. 2d. 617; *Gairing Tool Co.* v. *Eclipse Co.*, 48 F. 2d. 73.

This court in *Rome Grader Corp.* v. *Adams Mfg. Co.*, 135 F. 2d. 617, had a somewhat similar application before it. Our right to grant the motion was apparently recognized, and the showing which the moving party must make, was stated as follows:

> "To secure a rehearing on newly discovered evidence, two questions must be answered affirmatively: * * * (1) Has plaintiff exercised due diligence at all

times in its efforts to secure the newly discovered evidence? (2) Will such evidence be of such weight or importance as to necessitate a different conclusion? If either of these questions can be answered in the negative, the motion must be denied."

Two requirements are emphasized: (1) diligence, and (2) convincingness of the newly-discovered evidence.

While diligence is shown, we are satisfied that the newly discovered evidence here submitted would not have justified a different conclusion. Examining this evidence carefully, we find it was a record of contemporary action of officers and attorneys for the lessees, when discussing and proposing changes in the terms of the written agreements. As we view it, the written agreement in question is not ambiguous, but is clear and calls for no explanation or enlightenment and surely no modification by the court. Moreover, a study of this evidence fails to substantiate the claim that the parties actually intended to apportion certain items of cost on an equal basis, rather than upon the wheelage basis. We must, and do, deny the application for leave to offer this newly-discovered evidence.

Upon the petition for rehearing on the merits of this question, we are convinced, from further study, that we erred in one respect, namely, in the distribution of the $20,665.35 annual payment to Grand Trunk Railroad.

While the argument which led to the conclusion in our opinion, here under review, to the effect that this item, like the others, should be paid for on a wheelage basis, has support, there are, in the applicable written contracts and leases, provisions as to this item which control, and they require this item of cost of operation to be paid by the lessees on an equal basis.

Undoubtedly the parties were moving toward an apportionment of the cost on a wheelage basis. This was, of course, equitable and just. Great, and almost unbelievable, had been the growth of this enterprise in twenty years. However, there was an acknowledged, written exception to this method of distributing lessor's costs and expenses. The close and narrow question which was presented, and upon which we reached a conclusion which we now believe was erroneous, was this—Did the item of $20,665.35 payable to Grand Trunk fall within the provision for working ex-

penses, or was it a capital cost item to be met by the lessees on an equal basis?

We are indebted to counsel for giving us an opportunity to correct the erroneous conclusion which we reached, and to acknowledge our error.

The opinion heretofore rendered is modified to the extent that this item of $20,665.35 payable annually to the Grand Trunk Railroad shall be apportioned by Western Indiana among its lessees on an equal basis. In all other respects, the petition for rehearing and the motion for leave to offer newly-discovered evidence are denied. The costs of the appeals in Nos. 7875-7876 and 7877 shall be borne equally.

In No. 7878, the order recalling the mandate is vacated.

OPINION OF THE DISTRICT COURT, RENDERED ORALLY.

June 17, 1941.

BARNES, *District Judge:*

"In telling you what I think of this case, gentlemen, I confine myself generally to statements of conclusions respecting the several principal issues in the case.

"The first principal issue which had the consideration of counsel was the so-called management expense issue. The question there arises under Section 33 of the Joint Supplemental Lease of July 1, 1902. It is there provided:

> " 'That after the date hereof the lessor shall exclusively manage, operate and maintain every portion of the common property; and the entire cost of the management, operation, maintenance, repair and renewal of, and of all taxes, liens, water rents and assessments on, said railroad, buildings and facilities, the common use of which is reserved to the parties hereto, and the entire cost of the management, operation, maintenance, repair and renewal of, and all taxes, liens, water rents and assessments on, all enlargements and improvements thereof and additions thereto and on and to any other railroad hereafter acquired by the lessor for the common use of the parties hereto, shall be borne by said lessees in the proportion of their several wheelage uses of the various portions of said railroad to the total wheelage use thereof; * * *'

"It is further provided in that paragraph:

> " '* * * and for the purpose of distributing such cost, the lessor shall divide by lines across and at right angles with its right of way, its said railroad and property, including all appurtenances, into such sections as may be necessary in order to equitably distribute such cost of the management, operation, maintenance, re-

pair and renewal of, and all taxes, liens, water rents and assessments on, said several sections among the parties of the second part in proportion to their respective wheelage uses of such sections; * * *'

"It is further provided:

"'* * * and it may, from time to time, change such sectional divisions the better to subserve the purpose and intent aforesaid.'

"The lessor has divided said railroad, buildings and facilities, the common use of which is reserved to the parties hereto, into sections, and it has assigned to those sections the cost of the operation and maintenance thereof. That is to say, the materials and labor which have gone into, or which have been applied to a given section, have been charged to that section.

"The question before the Court has to do with the division of the management costs.

"Since 1902, and without objection by any one until 1929, the lessor has divided management costs on a wheelage basis as between sections, and having determined the management costs attributable to each section, has then divided the management, operation, and maintenance costs of each section on a wheelage basis.

"As has been indicated, this was done from 1902 down to 1929, without objection by any one.

"At that time, the Chicago & Erie Railroad Company objected, but it continued to pay management, operation, and maintenance costs which are charged to it by the lessor until 1933, when it ceased to pay any sums greater than those which would have been charged to it had the management costs been divided as between sections, on a basis which the Chicago & Erie Railroad Company says is more equitable and more in keeping, as it says, with Section 33 of the Joint Supplemental Lease of July 1, 1902.

"The Chicago & Erie Railroad Company says that management costs should be divided between sections on the basis of the ratio of the total of operation and maintenance cost of a given section to total operation and maintenance cost of the entire common property, and that the management cost for a given section having been determined and added to the opera-

tion and maintenance costs for that section, then the total of the three should be divided amongst the users of that section on a wheelage basis.

"What would be the ideal way to divide management costs between the users of different parts of a common property, the Court does not know.

"What would be the most equitable way to divide management costs between the users of different parts of the common property, the Court does not know.

"That the method of dividing management costs between the different portions of the common property suggested by the Chicago & Erie Railroad Company would be more equitable than the method which the lessor used without objection from 1902 to 1929, the Court does not believe.

"On the contrary, the Court is very strongly inclined to the opinion that the method of dividing management costs suggested by the Chicago & Erie Railroad Company would lead to a much more inequitable result than does the method which was followed for such a long period of years without objection.

"That Joint Supplemental Lease of July 1, 1902, does indicate that the parties had wheelage in mind as being an equitable way of dividing cost of management, operation, and maintenance. Certainly, nothing is said in there about a ratio of the sectional operation and maintenance expense, and total operation and maintenance expense. Nothing is said about that in the Joint Supplemental Lease of July 1, 1902. Something is said in that lease about wheelage.

"As the Court understands the facts, the parties were, in 1902, dividing management expense as between the sections on a wheelage basis. They were assigning to each section the actual cost of operation and maintenance of each section and, having gotten the cost of management, operation, and maintenance for a given section, they were dividing that cost of the three as amongst the parties on a wheelage basis.

"The fact that they were doing that, and that they continued to do it for such a long period of years is very persuasive to the Court that the parties thought that what they were doing, and what they continued to do, was fair and equitable, and was a fair interpretation of the meaning of the contract.

"There were additional Joint Supplemental Leases of 1917, 1925, 1932, and 1936. Each one of them contained provisions like unto the provisions of the Lease of July 1, 1902.

"It is the Court's conclusion that management expense is properly determined when it is divided as amongst the sections on a wheelage basis.

"The second general issue which was considered by counsel was the so-called rental issue. This issue relates to monies paid on account of nine parcels of property which are used as a part of the common property. As to eight of these parcels, the land is owned in fee by the Chicago & Western Indiana Railroad Company. The land was leased by the Chicago & Western Indiana to some one of the tenant owners, and then at a later date, the land was leased back to the Chicago & Western Indiana to be used as a part of the common property, for periods in each case equivalent to the unexpired portion of the term of the original lease.

"What I have said is true of eight of the leases. The ninth lease is a lease from the Santa Fe Railroad Company of property which is used as a part of the common property for which an annual payment is made.

"The Court is of the opinion that these rentals should be charged to the five owners, on the basis of one-fifth to each. It arrives at that conclusion from a consideration of the Preliminary Proprietary Agreement of January 16, 1902. That agreement provided that costs of the elevation, depression, and enlargements and improvements of, and addition to the lands and property of the Western Indiana Company, the common use of which has been, or may be reserved to the five tenant owners, should be paid by means of the issuance of bonds, the principal and interest of which bonds should be paid by the five tenant owners.

"The Court is of the opinion that these various contracts providing for the payment of money—eight of them to the five tenant owners, and one to the Santa Fe Railroad Company—provide for enlargements of, and additions to the lands and property of the Western Indiana Company, the common use of which has been, or may be reserved, and that, ac-

cordingly, the parties contemplated bonds should be issued therefor.

"The Court is of the opinion that the mere fact that bonds have not been issued does not relieve the owners, the five owners, of the obligation to pay in money the costs of those additions to, and enlargements of the common property.

"The Court is of the opinion that these monies which are paid out by the Western Indiana may be recovered from the owners and lessees, one-fifth from each.

"This Preliminary Proprietary Agreement of January 16, 1902, provided that bonds should be issued for the payment of the cost of acquiring or extinguishing the exceptional rights, privileges or exemptions which either parties of the second part possess or enjoy, in respect to any part of the common property of the Western Indiana Company.

"The 1902 Joint Supplemental Lease provided that the Western Indiana should pay to the Grand Trunk Company, as compensation for its release of the pecuniary benefits under said agreement of November 1, 1891, $20,665.35 per annum from the date hereof until it shall use for its traffic the railroad of the lessor, Western Indiana, south of 49th Street.

"Bonds were not issued for that purpose, however. The Court holds the same view in respect of this item as it holds in respect of the monies paid under the leases aforesaid. The mere fact that bonds were not issued does not destroy the right of the Western Indiana to recover from the five tenant owners this item which is required to be paid to the Grand Trunk, and in the Court's opinion, the Western Indiana may recover that sum, approximately $20,000.00 per annum, from the five tenant owners, one-fifth from each.

"If the Grand Trunk payment issue is regarded as a separate issue, then the next and fourth principal issue is that relating to the separate railroad operation. This refers to the expense of operating the suburban passenger trains by the Western Indiana, and the expense of freight switching operations by the Western Indiana.

"The Western Indiana, since August 1, 1904, has absorbed the loss on its separate suburban business, and since August 1, 1913, it has absorbed the expenses on its switching operations.

"The Monon and the Grand Trunk contend that the entire expense of operating both these services should be billed to the five lessees on a wheelage basis, though the gross receipts are retained in the treasury of the Chicago & Western Indiana.

"The Erie contends that the net loss should be billed to, and paid by the C. & E. I.

"The Court is of the opinion that this Preliminary Proprietary Agreement of January 16, 1902, and the Joint Supplemental Lease of July 1, 1902, set up a rather comprehensive scheme which was by the parties intended to supersede the numerous contracts, leases, and one thing and another that had been entered into between the parties in earlier years.

"The Court is of the opinion that those two contracts of 1902 do supersede the earlier contracts in respect of all the matters in controversy in this case. I think the last statement was too broad. Those two contracts do not supersede as to all of the items, but they do supersede as to additions to, and enlargements of the common property referred to in Section 33 of the Joint Supplemental Lease of July 1, 1902, and they do supersede earlier agreements as to the management, operation and maintenance of every portion of the common property referred to in Section 33 of the Joint Supplemental Lease of July 1, 1902.

"Those two contracts evidently contemplated that there would be some activities of the Western Indiana which would not be covered either by that Preliminary Proprietary Agreement, or the Joint Supplemental Lease of 1902.

"The expenses of operating the suburban passenger trains and of the freight switching service, or such items, the losses, if any, on these items should be absorbed by the Western Indiana.

"Next is the issue which has been referred to as the issue relating to miscellaneous charges and expenses. These miscellaneous charges and expenses have been paid by the Chicago & Western Indiana, and with one exception, have been billed to no one for reimbursement. The Chicago & Western Indiana has not received reimbursement. Those items relate to foreign freight cars, per diem, reclaims and repairs, expenses incident to rental on leased premises, certain rooms in the Dearborn Station leased to the Belt Railway Com-

pany, the Grand Trunk, The Wabash, and Eastern Illinois, for their respective exclusive occupancies, Illinois Franchise Tax, Federal Income Tax, work equipment, insurance, depreciation and repairs, expense on funded debt, track elevation, adjustments, retired bonds, and equipment.

"All of these items which the Court has enumerated are, in the Court's opinion, properly absorbed by the lessor. The one exception, which was referred to, is the taxes on surplus property, which are billed to the five owners, one-fifth to each.

"The Court has had a little difficulty in putting that item in a different class from the other items just referred to, and is not inclined to put it in any different class from the items just referred to, unless somebody can, within the next two days, show the Court why it should be, by a memorandum to be filed.

"I think the principal issues, most of them, have been covered by what the Court has said.

"Perhaps it might be well at this time to emphasize somewhat the Court's idea that the two contracts of 1902, so far as they are inconsistent with the earlier contracts between the parties—and they are inconsistent, in the Court's opinion, in some particulars—overrule those earlier contracts.

"Counsel may, within ten days, present drafts of findings of fact and conclusions of law, and a decree, not inconsistent with what the Court has stated.

"Counsel whose clients have any quarrel with the drafts which may be submitted in connection with this discussion may, within fifteen days from this date, file in writing their objections to, or observations in respect of such drafts. Counsel who submit the drafts may, within twenty days from this date, submit such, if any, reply as may seem necessary or desirable. That having been done, the making of findings of fact, and conclusions of law, and the decree will be taken without further oral argument.

PERTINENT FINDINGS OF FACT OF DISTRICT COURT:

"(32) Paragraph Ninth of the Preliminary Proprietary Agreement of January 16, 1902, and paragraph 33 of the Joint Supplemental Lease of July 1, 1902 (the provisions of which are repeated in the five joint supplemental leases above referred to) relate to and cover the same subject matter and are inconsistent with the provisions of paragraphs 5th and 6th of the Inter-Tenant Agreement of November 1, 1882, and the provisions in prior leases and agreements relating to and defining the expenses of the Western Indiana to be paid by the five lessee roads on a wheelage basis.

"(33) The six parties to the Preliminary Proprietary Agreement of January 16, 1902, and to the Joint Supplemental Lease of July 1, 1902, in executing said agreement and lease, provided a new definition of the expenses of the Western Indiana for which it was to be reimbursed directly by the five tenant owners, and a new basis of apportioning the said obligation to reimburse the Western Indiana, among the five roads who were parties of the second part in said agreement, and lessees in said Joint Supplemental Lease, such definition and basis to become effective from and after the execution of the Joint Supplemental Lease of July 1, 1902."

* * * * *

"(35) The said six parties to the Preliminary Proprietary Agreement of January 16, 1902, and the Joint Supplemental Lease of July 1, 1902, intended that the new definition and basis therein provided for, as hereinabove stated, should supersede and abrogate the various provisions of prior contracts, leases and agreements between the parties as to the definition of expenses of the Western Indiana for which it was to be reimbursed directly by the five tenant owners, and as to the basis of apportioning said reimbursement obligations among said five tenant owners." (Rec. 410-411.)

PERTINENT CONCLUSIONS OF LAW OF THE DISTRICT COURT:

"(1) The Preliminary Proprietary Agreement of January 16, 1902, and the Joint Supplemental Lease of July 1, 1902, provided a new definition of the expenses of the Western Indiana for which it was to be reimbursed directly by the five tenant owners, and a new basis of apportioning said obligation to reimburse the Western Indiana among the five tenant owners, which definition and basis became effective from and after the execution of the Joint Supplemental Lease of July 1, 1902.

"(2) In and by the Preliminary Proprietary Agreement of January 16, 1902, and the Joint Supplemental Lease of July 1, 1902, the six parties to said agreement and lease agreed that from and after the date of said Joint Supplemental Lease each of the five tenant owners should have equal right to use the common property of the Western Indiana upon like terms and conditions, and that each of said five tenant owners should pay an equal part of the cost of said common property, and of all enlargements and improvements thereof, and additions thereto.

"(3) The provisions of paragraph Ninth of the Preliminary Proprietary Agreement of January 16, 1902, and of paragraph 33 of the Joint Supplemental Lease of July 1, 1902, superseded and abrogated the provisions of paragraphs 5th and 6th of the Inter-Tenant Agreement of November 1, 1882, and the various provisions in prior leases, contracts and agreements, defining the expenses of the Western Indiana to be paid by the five tenant owners and providing the basis of apportioning said obligation among said five tenant owners.

"(4) Paragraph 33 of the Joint Supplemental Lease of July 1, 1902, is and has been, since July 1, 1902, the only agreement of the parties to said lease defining and controlling the expenses of the Western Indiana for which it is to be reimbursed directly by the five tenant owners." (Rec. 435-436.)